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MERCHANDISING OF PERSONALITY RIGHTS: A Distinctive Sign for Business Models in the Fashion Field

MERCHANDISING DE DIREITOS DA PERSONALIDADE: Um Sinal Distintivo para Modelos de Negócios no Ramo da Moda

MERCHANDISING DE DERECHOS DE LA PERSONALIDAD: Un Signo Distintivo para Modelos de Negocios en Moda

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ABSTRACT

This introductory study aims to assess the personality rights as a distinctive sign and also the construction of its protection in the intellectual property scope. It has been pursued to demonstrate that the merchandising of personality rights has been evolving to become a usual business model based on the commercial exploitation of fame that its holders have, therefore, reorienting the engagement of names related to luxury fashion.

Keywords: Brand, Personality rights, Merchandising.

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RESUMO

O presente trabalho é um estudo introdutório que tem por objetivo analisar os direitos da personalidade como sinal distintivo e a construção da sua proteção no âmbito da propriedade intelectual. Procuramos demonstrar, que o merchandising dos direitos da personalidade está evoluindo para se tornar um usual modelo de negócio a partir da exploração comercial da fama que os seus titulares detêm, reorientando a adesão de nomes ligados à moda de luxo.

Palavras-chave: Marca, Direitos da Personalidade, Merchandising.

RESUMEN

Este trabajo es un estudio introductorio que tiene por objetivo analizar los derechos de la personalidad como signo distintivo y la construcción de su protección en el ámbito de la propiedad intelectual. Se trata de demostrar que el merchandising de los derechos de la personalidad está evolucionando para convertirse en un modelo habitual de negocio a partir de la explotación comercial de la fama que sus titulares detienen, reorientando la adhesión de nombres ligados a la moda de lujo.

Palabras clave: Marca, Derechos de la Personalidad, Merchandising.

INTRODUCTION

The segment of luxury fashion has, among many attributes, glamor. Universe in which authorial creation, of a stylist specifically, has the ability to create a mythical around certain personalities.

The subject has been the subject of studies in several areas of knowledge, such as sociology, social psychology, and aesthetics. Internationally, academic studies and theses demonstrate that the surrounding universe of this segment, whether the creation itself, its creator or the brand, is not unrelated to the economic exploitation based on intangible goods. In Brazil, studies and research on the subject are still incipient, including in the legal area.

Nonetheless, it cannot be denied that this segment is undoubtedly relevant, especially considering the composition of the trademarks, which are mostly formed from the civil name, patronymic or famous pseudonym that refer to the great creators of the luxury segment.

Because they are so composed, these designations attract protection related to personality rights, and begin to exercise a function not only from the common civil domain, but also from intellectual property, specifically about industrial brands and designs, throwing light on the current debate about the field of fashionlaw as an introducer of a redefinition of the classic institutes of civil law and intellectual property.

This paper targets to analyze the re-signification of the personality right in counterpoint to the brand, pointing out the possibilities and limits of the use of one and another in the segment of luxury fashion, propelling a

attractive business model for its creators, internationally, such as personality rights merchandising.

The discussion to be undertaken is relevant and justified due to the rare and incipient production of papers on the subject in Brazil, although well developed in theses and dissertations in international scope and in documents produced by the World Intellectual Property Organization (WIPO).

For purposes of this study, which we consider as the first part, we will work on the following items with the legal norms of Brazilian law and with the doctrine that allows us to answer the hypotheses that will be placed.

In the second part, we intend to demonstrate how this branch of business develops, through research in cases decided in the Public Administration, in the Brazilian *Instituto Nacional da Propriedade Industrial (INPI)* [National Institute of Industrial Property], specifically, and in the jurisprudence of the Court of Justice of the *Rio de Janeiro* State.

Hence, the final conclusion about our hypotheses will be presented in the study's second part.

Brand: principles and attributes

The Constitution of the Federative Republic of Brazil of October 5th, 1988 included the right of intellectual property in the list of the fundamental rights and guarantees included in the Article 5th. This provision reads as follows: "The law shall guarantee to industrial inventors a temporary privilege for their use, as well as protection of industrial creations, trademark ownership, company names and other signs, in view of the social interest and the technological and economic development of the country".

The Trademarks, properly, are regulated by the Industrial Property Law (IPL) No. 9,279, May 14th, 1996, in Title III. Article 122 states that "distinctive visually perceptible signs not included in legal prohibitions are susceptible of being registered as trademarks". And in the Article 123 are related the types of marks protected by this law¹.

In specialized doctrine, the term brand has several meanings, which may vary according to the field of knowledge about which it is embedded. Therefore, there are definitions in the field of marketing practices, in the universe of semiological discourse, as well as in the legal field related to the matter of intellectual property.

In this work we delimit and conceptualize the institute mark in the scope of legally protected intellectual property, and illustrate it from the perspective of recognized authors of consecrated legal works.

¹ "Art. 123 – For the purposes of this law, the following are considered: I - product or service mark: that used to distinguish product or service from another identical, similar or similar, of different origin; II - certification mark: that used to attest to the conformity of a product or service with certain standards or technical specifications, notably as to the quality, nature, material used and methodology used; and III - collective mark: that used to identify products or services coming from members of a particular entity".

According to Carlos Olavo, “the brand is, above all, a sign, in other words, a reality perceptible to the senses”. “It is the signal that serves to differentiate the business origin of the product or service proposed to the consumer, and therefore integrates with the distinctive signs” (OLAVO, 2005: 75).

This author allows us to identify in his placement the existence of a brand categorization as a distinctive sign of the trade that, among others, has a function to be exercised in the market, and by which receives the protection of intellectual property law.

Carlos Fernandez - Nôva recognizes the brand as an immaterial good. For this author, “the mark is a good that does not have an existence in itself, on the contrary, it needs to materialize in tangible things (*corpus mechanichum*) to be perceived by the senses, being, in addition, susceptible of being reproduced unlimitedly and in a way simultaneously in different places” (NÓVOA, 2004, p.27).

The mark in its varied definitions and applications, only finds protection against third parties through the right of intellectual property, when registered in the form of IPL. Failure to do so means that it will be left to the holder of a signal if he is only rescued by unfair competition in the event of misuse of his mark by third parties. This stems from the adoption by Brazil of the system of attribution of law, as opposed to the declarative system. In this, the protection to the mark is given by the use of the same, while in that, the protection is only obtained through the registry.

Part of the doctrine provokes us with questions about the attributive and declarative systems: “What gives ownership to brands? The use or public recognition of ownership? The systems vary under the tolerance of the Convention of Paris-CUP², with a great current tendency by the registry; but there are still laws in which the prior use is the assumption of registration. Thus it is said that the system in which the exclusivity arises from the registry, attributive; the one in which property is born of use, but homologated by registration, declaratory” (MORO 2003, 55).

The law of trademarks carries as one of its peculiarities the principles of territoriality and specialty. The principle of territoriality refers to the limitation of the protection of local law, and that of specialty to the linking of the legal protection of the trademark to the activity of its owner; in other words, protection is limited to certain products or services, belonging to data market segments, and territories.

The Brazilian IPL does not bring a general concept about brands, but introduces definitions regarding types of brands and indicates, in Art. 122, which cannot be protected through this institute, excluding from the scope of legal protection the sound, taste and olfactory signs. These signs are now considered safeguard in some countries, given the reality that arises from the commercial dynamics.

The prohibitions imposed by the IPL fall into two categories: absolute and relative. The first concerns the obstacles imposed to the registration as a mark of signs that reach public or social interests, such as those of designating public institutions, flags of countries, generic term, terms that violate honor and good customs or even those indispensable signs to compose other brands, as is the case of colors, when required in isolation. The second refers to the obstacle to legal protection for signs that identify rights of third parties, whether these other intellectual property rights such as copyright, industrial design, commercial name, are rights of individuals arranged in other spheres of the country's legal system, as in the case of personality rights, for instance.

Between the relative prohibitions and the exception to the principles of specialty and territoriality, personality rights exude that, because they are related to a private right of third party not related to a market segment, is presented as a prominent element in the effect of a blockage inherent in it and, therefore, limiting trademark law, since it has the capacity to oppose the constitution of a trademark, in view of the provisions of the IPL, Article 124, items XV and XVI³.

The Personality Rights in the Intellectual Property Universe

Brazilian private law, over a long time, adopted a conception of personality essentially patrimonialist, aimed at property in all its manifestations.

According to Miguel Reale, “the important thing is to know that each right of personality corresponds to a fundamental value, starting with the body itself, which is the essential condition of what we are, what we feel, perceive, think and act.” “Next comes the protection of the name, which includes the first and last names, and the use of the name of the person in publications or representations that expose public contempt, even when there is no defamatory intention, is not acceptable. It is the same reason why, without authorization, the use of the

² This Convention is intended for the international protection of industrial property in its broadest sense in order to protect industrial inventions, trademarks, designs, utility models, trade names and geographical indications and to suppress unfair competition. On Brazil's accession to the CUP, see: BASTOS, Aurélio Wander. *Dicionário de Propriedade Industrial e Assuntos Conexos*. : Lumen Juris, 1997..

³ “Article 124 - They are not registrable as a trademark: [...]; XV - civil name or signature, family or patronymic name and image of third parties, except with the consent of the holder, heirs or successors; XVI - well-known pseudonym or surname, singular or collective artistic name, except with the consent of the holder, heirs or successors;”

name of others in commercial advertising is prohibited "(REALE, 2004, p.2).

The same author adds that "each right of personality is linked to a fundamental value that is revealed through the historical process, which does not develop in a linear way, but in a diversified and plural way, composing the various civilizations, in which there are founding values and accessory values, constituting those that I call axiological invariants. These seem innate, but they point to the moments of longer duration, which together make up the horizon in the sense Jaspers gives, retreating as the human being advances, acquiring new ideas or ideals, as well as new instruments claimed for the good of individuals and of collectivities. Each civilization corresponds to a picture of the rights of the personality, enriched, with new achievements in the plane of sensibility and thought, thanks to the progress of the natural and human sciences "(REALE, 2004, p.2).

It is now possible to see a solid expansion of the idea of protection in the field of personality rights to legal entities of a public or private nature. Personality is no longer an exclusive normative attribute of the human being, and it also includes legal entities, as provided for in the Brazilian Civil Code on 01/10/2002⁴.

Personality rights, therefore, are a theoretical evolutionary construction in civil law and, of course, their existence is bound to be consolidated as a subjective right, in the hands of or attributed to a holder, who may be a human or legal person, considered in its essential aspects and constitutive, pertinent to the physical, moral and intellectual integrality, that are born and accompany the person throughout his existence. As Caio Mario da Silva Pereira states: "our current right does not recognize any hypothesis of loss of personality in life." (PEREIRA, 2011, page 187).

The Brazilian Civil Code incorporated among its Articles from 11st to 21st the personality rights in general statements, without being restricted to the physical integrity, but also, covering the protection of the name and the image in the most diverse forms and manifestations.

Concerning the name, surname, and pseudonym, which intrinsic to the person, as it individualizes and identifies it, it is expressly guaranteed protection against its use and defense against abuses committed by third parties through exposure of the name to the public, reputation aggression or disclosure by advertising not authorized by the owner.

Contextualizing the rights of personality in the area of intellectual property, it is verified that the use by third party of a signal composed of personality configurative element, occurs with the relativization of the prohibitive

or prohibitive countervailing inherent in the institute of civil law, via of contractual authorization between the holder and the licensee, allowing, even, a more comprehensive economic exploitation, given the nature of the right of the personality assigned to the licensee's use. It is considered here that the right of personality is inalienable and that of temporary mark, although renewable according to the rules contained in the IPL.

Personality Rights Merchandising in the Fashion Field

The term merchandising has broad meaning according to the areas of knowledge. We will use in this work the concept that has been adopted in the legal framework.

In its more specific conception, merchandising reveals itself as the possibility of exploitation of a good that, due to the notoriety acquired in its main use, also denominated primary, becomes potentially capable of being explored in secondary economic activity, mainly to differentiate products or services or add value to them. Used in this way, the good starts to act in a distinctive function, considered, in essence, relevant to the brand⁵.

Thus, "when in law, it refers to merchandising, it is intended to refer to an authorization conferred by the holder of a good that acquired suggestive value by its use in one activity, the other person to use it - in a different activity - to distinguish their products or services or to integrate them into them, always with the objective of promoting their sale" (CARVALHO, 2003, p.14).

In a document produced by the World Intellectual Property Organization (WIPO), it can be seen that merchandising related to intellectual property can be identified by categories, such as merchandising of brands, characters and personality rights. (WIPO, 1994).

According to Maria Miguel de Carvalho, the merchandising can be: "of copyright (especially on fantasy characters or, in Anglo-Saxon terminology, character merchandising); of personality rights (especially the name and image of famous people, personality merchandising); and distinctive signs of companies and products and services (corporate merchandising)" (CARVALHO, 2003, p.14).

For each of the types of merchandising are linked diverse rights. In this sense, in merchandise merchandising are used goods protected by copyrights, in view of whether they are artistic creations. In the merchandising of distinctive signs, the good to be used is constituted by a brand, generally considered of high reputation (ARAÚJO, 1999), which, due to its "downgrading" and blocking effects⁶, in other words, preventing third parties from applying for registration in any class, enjoys the power of exclusion that allows the negotiation of its

⁴ "Art. 52. The protection of the personality rights is applied to legal persons, as appropriate."

⁵ See the works of Carvalho and Gonçalves cited in the references.

⁶ We have inserted this neologism, in order to protect the brand of high reputation being an exception to the principle of specialty. The term "downgrading" has already been used in academic studies that deal with the figure of the brand here alluded to.

attractive force. In personality merchandising, the rights of the personality of a public and famous person that authorizes the use of their name, pseudonym or image to promote the sale of products and services are considered (CARVALHO, 2003, p.14). The latter type interests fashion designers to, through their names, identify their production and add notoriety to it.

The legal practices that make it possible to carry out merchandising generally are based on atypical contracts, such as a license for the use of the good that has gained notoriety in its primary activity as a personality right, so that the third party can exploit it in its secondary activity, sell products or provide services, using the object of the merchandising agreement to enhance its economic activity.

It can be said that in merchandising there are advantages for both parties. For one, the holder, whether of personality, copyright or trademark law, who licenses his property in exchange for a remuneration that will be contractually agreed. For the other, the transferee, because it will enter the competition with a signal of greater visibility, so as to stand out from its competitors when entering into a given segment with a privileged position in relation to the others.

Accordingly, Maria Miguel de Carvalho explains: “in merchandising, the licensee develops the product, in other words, makes an investment. Although he is obliged to pay a sum of money to the holder of another right, he will have an advantage: the association with such a well-known signal allows him to stimulate the purchase impulse more quickly. For the holder, it is the additional value that his good can give him that entitles him to authorize a third party to use it in relation to products or services in a sector quite different from his own” (CARVALHO, 2003, p.14).

As stated by the same author, some conditions must be observed in order to give effect to the merchandising contract in relation to third parties: “so that the good - that has achieved popularity, advertising strength, and attractive capacity, during the primary activity - can be the object of merchandising for the purpose of assigning a secondary activity of distinguishing goods or services, it is necessary for the holder, in addition to the exclusive right over the good, to have primary use, to prohibit the unauthorized use of that secondary activity. In the light of trademark law, the existence, in favor of the copyright owner, of an *ius prohibendi* in relation to the use of the copyright by third parties not authorized as a trademark is confirmed. Consequently, the economic and legal circumstances for the practice of merchandising are confirmed” (CARVALHO, 2003, p.62).

According to the WIPO, the latest type of merchandising involves the use of essential attributes of real people in the marketing or advertising of products or services. In

summary, it has been that this use is not only in marketing and advertising activities. The right of the personality starts to function as a true brand, distinguishing, in the market, the products and services of others.

In deepening the discussion about merchandising, the documents provided by WIPO add that, in general, the real people whose attributes are marketed and linked to products and services are personalities well known to the public. This fact, according to the aforementioned Organization, would be one of the reasons for the use of the term merchandising of reputation as equivalent to that of personality. The WIPO attributes the choice of the product to be placed on the market in function of the appeal provoked by the use of the right of the personality next to or affixed to it.

So, the importance that certain personalities have in an era dominated by communication and the propagation of messages becomes unquestionable. This fact is highlighted in the universe of luxury fashion. The perception of notoriety, linked to certain public figures, makes them, from the beginning of their professional activities, reflect on the possibility of merchandising their rights of personality. This occurs in sports, in the audiovisual production sector and also in the luxury fashion sector. In the latter, some names or patronymics stand out to the point of adding value to the products or services with which they are served.

Exactly because of this possibility, some names or patronymics began to be used as trademarks, being registered as such also in the Brazilian INPI, in order to distinguish products that, only by being endorsed by such names, already have a perception of excellence in quality before even of their use or experimentation by the consumer. The personality rights of luxury fashion designers are brands that carry “experiential” benefits, as Lipovetsky and Roux points out: “While current consumer goods correspond to benefits of the functional type, luxury brands refer to such benefits experiential, that is, that imply in the client a search for strong and exceptional experiences and emotions” (LIPOVETSKY and ROUX, 2005, 66).

As a result, it is necessary to reflect on the best way to use these rights of the personality in economic activity, from its use as a distinctive sign, as is the case of the brand. Two possibilities must be considered: either the holder of the personality right, through a licensing agreement, authorizes a third party to register as a trademark his or her name or image; or the proprietor of the personality right itself deposits such a right as a trademark.

In the case of this last hypothesis, it must be ascertained whether the holder of a personality right in the fashion sector effectively exercises an economic activity compatible with the segment of products and services

in which he wishes to register his name or image as a trademark. Brazilian law through its article 128⁷. As a creator of the fashion world, it is thought that Christyan Lacroix is able to apply for his name or image as a brand, for example, in the clothing sector. We can check the records of luxury brands bearing the holder's civil name, based on the *INPI* trademarks.

Nevertheless, a more complex question can be posed when one inquires about the relevance of the same creator to require as a brand his personality right for other segments, a fact that can also be observed from a brief consultation based on brand deposits and trademark registrations. The *INPI*, considering the principle of specialty, concerning the right of trademarks, and also, consequently, the attribution only to the holder of the right of personality the burden of preventing unauthorized third parties from applying as a trademark such right.

In spite of the absence of economic activity on the part of the holder of the personality right, which in itself would be a limiting to the application for registration of a trademark, the holder of the right of personality should think about other issues of a more practical nature when using the trademark protection system to the detriment of the exercise of its personality right, such as blocking possible registrations. It is necessary to register that the mark is limited by the principle of specialty and its protection will only be possible in the segment for which the signal was requested.

In order to obtain protection in all segments from the use of trademark law, the right holder of the personality will have to apply for his name or image in all existing sectors or be able to prove that his trademark can receive the protection granted to the high marks Article 125 of the IPL⁸. In case of requesting protection in all segments, hardly all the requirements would prosper, because it would be very difficult for the holder of the right of personality to obtain records with his name or image in all sectors, having to prove the economic activity in each one. As a high reputation, the protection must be verified and proven before the *INPI*, which will attribute such status to the trademark in one of the classes of the Nice Classification⁹, making it possible, through a single registration, to prevent any similar or similar

signs being required and trademarked by third parties in any other segment.

Under the provisions of the IPL, it is understood that third parties may only request as trademark elements of personality law when authorized by the holder of that right. It should be emphasized that personality law has a much wider prohibition power than trademark law, because, in any sector, the holder of the personality right may oppose having his or her name or image required as a trademark by a third party without his or her authorization. Therefore, it is necessary to follow the requests made by third parties in the body responsible for trademark registration in Brazil, the *INPI*. This action may prove to be a burden to the right holder of personality. However, paradoxically, when requesting as a brand your personality right for yourself, you will also have the burden of having to keep track of all the existence of that record, as well as having, in case of an expiration¹⁰, effectively proving the use of such a mark.

Hence, it is understood that the most advisable way to guarantee the exclusivity and the permanence of the signal linked to a personality right, would be through a license agreement, in order to authorize third parties to register as a trademark a personality right. This tends to be the best option for the right holder of personality. Nonetheless, in Brazil this is not yet the most widely used form of business involving decision making on the pertinence of requiring the grant of a trademark or licensing the use of personality rights for this purpose. At first, this behavior may be a consequence of the incomprehension of the comprehensiveness of personality law and the current practices that have been developed in other international systems.

In this special type of contract, widely diffused in developed countries, intellectual property is integrated into the product as a way of increasing or arousing the general interest. They are usually signed with an exclusivity clause, obliging the company concerned to enforce the rights of the proprietor (BASTOS, 1997, p. 168). This is the case in the three cases, that is, in copyright, in trademark law, when the sign is considered to be of high

⁷ "Art. 128. Individuals or legal entities governed by public law or under private law may apply for registration. Paragraph 1. Individuals under private law may only apply for a trademark registration related to the activity they carry out effectively and lawfully, either directly or through companies that they control directly or indirectly, declaring, in the application itself, this condition, under the penalties of the law."

⁸ Art. 125. The trademark in Brazil considered of high renown will be guaranteed special protection in all branches of activity.

⁹ In order to facilitate the operationalization of the examination activity for the purpose of registration of trademarks, most of the countries use the Nice Classification of Products and Services, which allows indicating which products and services the holder intends and classifies his applications according to the aforementioned classification for prior search purposes. There is a certain relationship between the Nice Classification and the sectoral division and the use of it is necessary for the application of the specialty principle.

¹⁰ IPL: "Art. 143 - The registration, at the request of any person with a legitimate interest, will be terminated if, after five (5) years of its grant, at the date of the application: I - use of the trademark has not been initiated in Brazil; or II - the use of the trademark has been interrupted for more than 5 (five) consecutive years, or if, within the same period, the trademark has been used with modification that implies a change of its original distinctive character, as stated in the registration certificate. 1st Paragraph - There shall be no lapse if the owner justifies the disuse of the mark for legitimate reasons. 2nd Paragraph - The owner will be summoned to manifest within a period of 60 (sixty) days, having the burden of proving the use of the mark or justifying its disuse for legitimate reasons. Art. 144. The use of the mark must comprise products or services included in the certificate, under penalty of partially expiring the registration in relation to those not similar or similar to those for which the mark has been proven. Article 145. The application for revocation shall not be known if the use of the trademark has been proven or justified its disuse in a previous process, required less than 5 (five) years. Art. 146. The decision that declares or denies expiration shall be subject to appeal."

renown, as well as in personality law, which has the peculiarity of being an off-balance-sheet right.

CONCLUSIONS

The present work, which is considered the first part of a larger study, dealt with personality rights from the perspective of its recognition as a distinctive sign that adds value to high-performance tangible goods.

Primarily, we present the main legal aspects that ensure the protection of trademarks and then we address the rights of the personality, especially those related to names, including the first and last names, that can be legally associated with products to distinguish them with force of exclusivity.

It was verified the importance that the rights of the personality, from the Brazilian Civil Code of 2002, even to mark goods, in view of their power of limiting blockade of trademark law.

It was possible to demonstrate that, internationally, personality merchandising is usually adopted in commercial practices, but still little recognized in Brazil by agents involved in its economic exploitation.

Conclusively, we understand that the objective of this work was fulfilled in that it was possible to highlight the importance of the theme, and the international opening for its adoption, exposing how little is understood or used internally.

As we noted in the introduction, this conclusion is merely demonstrative of the line of business. In the second part, we will present the analytical conclusions that are obtained by the study of cases in the scope of administrative and judicial decisions. It will be based on the decisions of the Brazilian INPI regarding the matter, as well as, on the decisions of the Court of Justice of the *Rio de Janeiro* State.

By putting together the two studies, it is possible to assert that they are going to allow us to demonstrate the degree of innovation and sustainability for this business.

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